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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MARY MARTIN, Guardian of Michael Martin,
Petitioner,

v.

PATRICIA MAJOR and LEETA MARTIN,
Respondents.

On Petition for Writ of Certiorari to the Michigan Supreme Court

REPLY BRIEF OF PETITIONER

CARTER G. PHILLIPS
MARK E. HADDAD
PAUL E. KALB
MARISA A. GOMEZ
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

ANDREW J. BRODER *
THOMAS F. NAUGHTON
VLCKO, LANE, PAYNE & BRODER, P.C.
32100 Telegraph Rd., Ste. 200
Bingham Farms, MI 48025
(810) 642-7733

Attorneys for Petitioner

* Counsel of Record

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REPLY BRIEF OF PETITIONER

Until the decision of the Michigan Supreme Court, every official body to consider Michael Martin's case—the hospital ethics committee, the guardian *ad litem*, the trial court, and the court of appeals—concluded that Mary Martin was acting consistently with her husband's express wishes in seeking to remove the feeding tube that currently serves to prolong Michael's hopelessly dependent condition. Both the trial court and a unanimous court of appeals found the evidence of Michael's wishes "clear and convincing." Indeed, there is no contrary evidence of Michael's intent. Thus, it was only by fashioning a more restrictive evidentiary standard—one that requires individuals to predict the "specific circumstances" of their incapacity—and by ignoring the unequivocal evidence that, above all else, Michael wanted his wife, Mary, to ensure that his medical treatment decisions conformed with his wishes, that the Michigan Supreme Court could reach the startling result that it did.

This case therefore squarely poses both of the questions presented in the petition. And, as the opposition and briefs of *amici curiae* serve to underscore, the questions are of vital importance. The *amici curiae* who oppose the petition because of their "serious concerns" that the Court will reverse the decision below concede that there are many persons "whose interests will be profoundly affected by this Court's decision" on this petition.[1] The *amici curiae* who support the petition demonstrate that the decision below compounds the confusion that already exists concerning the ability of patients, through the advance expression of their wishes to spouses or other family members, to control medical decisionmaking after they lose competence.[2]

Respondents do not and cannot dispute the importance of the issues raised. Rather, they misstate the relevant law and facts, frivolously dispute the Court's jurisdiction, and defend the merits of the decision below. None of these stratagems undermines the importance of resolving the constitutional issues presented.

I.

Respondents initially attempt to argue that the first question presented does not merit review because "[t]he *Martin* Court decision here follows the analytical path carved by several states and *Cruzan* over the past twenty years."[3] But that argument cannot be sustained, as the

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[1] Brief of Michigan Protection and Advocacy Service *et al.* as *Amici Curiae* in Support of Respondent's Response to Petition for Writ of Certiorari at 2, 5.

[2] Brief of the University of Michigan Medical Center *et al.* as *Amici Curiae* in Support of Petitioner.

[3] Response to Petition for Writ of Certiorari ("Opp.") at 11-12; *see also id.* at 19 (analysis below "followed this Court's lead in *Cruzan* in every instance, and its statement of the law conforms with *Cruzan*"). These statements also dispose of respondents' half-hearted assertion—raised on page 1 of their brief but never argued

amici curiae who oppose the petition concede, because the Michigan Supreme Court was forced to go beyond anything this Court sanctioned in *Cruzan* v. *Director, Missouri Department of Health*, 497 U.S. 261 (1990), and impose "a more detailed standard" [4]—the "specific circumstances" requirement—in order to reverse the decisions of the lower state courts. Thus, in attempting to reconcile the Michigan Supreme Court's decision with *Cruzan* and with the decisions of other courts cited by petitioner (see Pet. at 13-14), respondents are forced ultimately to argue that the heightened evidentiary requirement imposed here is justified because "the state's interest in life is elevated if the petition subject is neither in a persistent vegetative state nor terminally ill" (Response to Petition for Writ of Certiorari ("Opp.") at 20), and because "Martin has demonstrated a current desire to live" (*id.* at 24). Neither distinction is valid, and neither is a basis for denying review.

The fact that Michael's condition is not precisely that of a persistent vegetative state cannot justify imposing an additional burden, beyond the clear and convincing standard as applied by other courts, upon the ability of

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—that this Court lacks jurisdiction over the first question presented because the decision below rested upon Michigan common law. The Michigan Supreme Court plainly relied upon *Cruzan* and thus interwove federal law with its state rulings. It is also notable that the Michigan Supreme Court made no statement sufficient to establish adequate and independent state grounds under *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983). Furthermore, where, as here, state law is less protective of federal constitutional rights than is federal law, and the federal constitutional issues have been raised before the state court, even express and exclusive reliance upon state law will not serve to insulate the opinion from this Court's review. *Massachusetts* v. *Upton*, 466 U.S. 727, 738 (1984) (per curiam) (Stevens, J., concurring).

[4] These *amici curiae* concede that this case required the Michigan Supreme Court to establish "a more detailed standard of what 'clear and convincing evidence' must look like." Brief of Michigan Protection and Advocacy Service *et al.* as *Amici Curiae* in Support of Respondent's Response to Petition for Writ of Certiorari at 9.

patients to enforce their medical treatment wishes. A patient's liberty interest in refusing unwanted medical treatment is not grounded in quality-of-life concerns, but in the value our society has traditionally accorded the individual's right to self-determination. *Cruzan*, 497 U.S. at 278-79; *id.* at 287-89 (O'Connor, J., concurring). This liberty interest is one that both conscious and unconscious patients possess. *Id.* at 278-79. Indeed, the liberty interest evolved from the doctrine of informed consent, which has had its chief application in decisionmaking by competent patients. *Id.* at 269-70. Thus, respondents' notion that the liberty interest of a patient who is *not* unconscious is somehow more vulnerable to state intrusion than that of a patient who is unconscious, has no basis in law and effectively turns the evolution of the liberty interest on its head.

Not surprisingly, many state courts have refused to restrict the ability of patients to refuse medical treatment based on quality-of-life considerations such as the lack of terminal illness or indications of some awareness of self or environment. The Florida Supreme Court, for example, held that the constitutional right of an incompetent patient to refuse life-sustaining treatment "cannot be qualified by the condition of the patient" and therefore permitted removal of life-prolonging treatment from an incompetent, nonterminal patient who was unable to communicate but had some awareness of her environment. *In re Guardianship of Browning*, 568 So. 2d 4, 7-9, 13 (Fla. 1990). The highest courts of several other states have upheld the rights of competent quadriplegic patients to refuse life-sustaining treatment in the absence of terminal illness. See *Thor* v. *Superior Court*, 855 P.2d 375, 387 (Cal. 1993); *State* v. *McAfee*, 385 S.E.2d 651, 652 (Ga. 1989); *McKay* v. *Bergstedt*, 801 P.2d 617, 631-32 (Nev. 1990). Another state's highest court has upheld the right of a competent, nonterminal patient to refuse life-sustaining blood transfusions for an ulcer. See *Norwood Hosp.* v. *Munoz*, 564 N.E.2d 1017, 1025

(Mass. 1991); *cf. In re Spring*, 405 N.E.2d 115, 122-23 (Mass. 1980). In short, numerous courts agree that "[a]ll patients, competent or incompetent, with some limited cognitive ability or in a persistent vegetative state, terminally ill or not terminally ill, are entitled to choose whether or not they want life-sustaining medical treatment." *In re Peter by Johanning*, 529 A.2d 419, 423 (N.J. 1987). Respondents' bald assertion that "[h]ad the Court [below] held for the petitioner, *Martin* would have been the first appellate case nationwide authorizing withdrawal of life supports from an incompetent person who was neither in a persistent vegetative state nor terminally ill" (Opp. at i-ii) is thus categorically incorrect.

Equally misleading is respondents' repeated assertion that Michael has expressed a current "desire to live" that should outweigh his previously expressed views. *Id.* at 16 & n.11, 24. None of the courts below found that assertion credible, and it flies in the face of everything those courts did find and accept as true about Michael. See Pet. App. 3a-9a.[5] These misstatements reveal respondents' determined resistance to acknowledge the harsh reality of Michael's existence today. See Pet. at 2-3, 5. As the Butterworth Hospital Ethics Committee determined, "the persistence of his condition and the level

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[5] To respond fully to each of respondents' misstatements and mischaracterizations of the record would require a separate reply. One telling example is respondents' extended recitation of the testimony of Dr. Kreitsch, who stated that Michael's frequent "smiling" and " 'large grin' " were indicative of a happy disposition. Opp. at 2-3. The probate court specifically rejected that testimony: "The smile in this Court's opinion and based on the best medical evidence before it, is a condition of his brain damage and it is not a reflection of an emotion of happiness." Pet. App. 86a. As Dr. Cranford, who observed a huge smile on Michael's face when both he and Mary, at separate times, told Michael that his daughter, Melanie, had been killed in the accident, noted, "the horror in this case is you don't know what he's thinking for sure, you don't know what he's feeling. He sure isn't feeling pleasure when he smiles unless he's glad that his daughter's dead." R. 488b; *see also* R. 446b, R. 449b, R. 466b-468b, R. 483b, R. 495b-498b.

of his functioning were equivalent to a persistent vegetative state for purposes of considering the removal of nutrition support." R. 633b.

Respondents' attempt to rewrite the facts of Michael's existence and ignore the findings made and accepted below is in any event beside the point. There is no dispute about the relevant facts, because the Michigan Supreme Court accepted the findings of fact as summarized by the court of appeals. Pet. App. 3a-9a. The basis for its disagreement with the court of appeals was in the legal standard to be applied, which was in turn grounded on the Michigan Supreme Court's determination that a higher standard was appropriate given the patient's specific circumstances. That determination was erroneous, because an individual's liberty interest in refusing treatment, by its very nature, transcends particular diagnoses of consciousness or unconsciousness. The Michigan Supreme Court's departure from *Cruzan* and from the decisions of other state supreme courts therefore merits review by this Court.

Respondents' other points only reinforce the importance of the petition. Respondents argue that because Michigan had not clearly defined the rights of patients to provide for future medical decisionmaking at the time of Michael's accident, Michael has no viable claim today that he was deprived of notice sufficient to allow him to protect his liberty interest in refusing unwanted treatment. Opp. at 23-24. The argument sidesteps the crucial point. Michael *had* a liberty interest in refusing treatment prior to his accident, and he sought to exercise it in a most reasonable, time-honored way: by confiding repeatedly in and relying upon his spouse. Having confirmed in *Cruzan* that individuals do have such a constitutional liberty interest, this Court should now clarify that the Due Process Clause forbids states from adopting procedures that operate to deny persons who have acted reasonably the ability to protect that interest.

Finally, while respondents deny that the decision below is inconsistent with this Court's decision in *Planned Parenthood* v. *Casey*, 112 S. Ct. 2791 (1992), they concede that in *Casey* "this Court wrestled with principles which are present here." Opp. at 28. Indeed, the fundamental question at issue there—the degree to which an individual's ability to exercise her liberty interests may be burdened by state procedural rules—is also the question here. Respondents' admission of *Casey*'s relevance—and the Michigan Supreme Court's complete indifference to the serious burden its "specific circumstances" test has placed on individuals seeking to protect against unwanted medical treatment—underscores the need for plenary review of the opinion below.

II.

Even if there were any significant doubt whether the evidence of Michael's treatment choices was sufficiently clear and convincing, there is no doubt that Michael wished to have his wife Mary, and not his mother or sister—let alone a physician, a hospital administrator, a judge, or the Michigan Supreme Court—decide whether and how he should be kept alive. Thus, even if the Michigan Supreme Court's holding on the lack of clear and convincing evidence could be sustained, this case nevertheless squarely raises the important constitutional question of mandatory state deference to surrogate decisionmakers that this Court deliberately left open in footnote 12 of its opinion in *Cruzan*, and that Justice O'Connor addressed at length in her concurring opinion.

Respondents nowhere dispute that this question is an important constitutional issue that needs to be decided by this Court. They claim only that the issue was not properly raised below and that it is not ripe. Neither claim has merit.

Respondents base their assertion of a failure to raise the issue below entirely upon the fact that petitioner did not cite specifically to footnote 12 of *Cruzan* in her brief

before the Michigan Supreme Court. Opp. at 25 (quoting Pet. at 8-9 n.8). But this Court has never required such precision in determining whether issues were fairly placed before lower courts. *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928). Petitioner's explicit reliance below on *Cruzan* in attempting to obtain permission to carry out Michael's previously expressed treatment wishes was plainly sufficient to place the surrogacy issue before the Michigan Supreme Court. See *Taylor* v. *Illinois*, 484 U.S. 400, 406-07 n.9 (1988); *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 85-87 n.9 (1980).

There is similarly no basis for respondents' argument that the claim is not ripe. A principal point of the Michigan Court of Appeals' initial decision to remand the case for further factfinding was to clarify the record on the propriety of Mary's guardianship (see Pet. at 4; Pet. App. 101a-111a), and the trial court made unequivocal findings on this that respondents do not and cannot dispute. See Pet. at 7 & n.7; Pet. App. 34a n.17, 66a, 83a; R. 391b. The trial court found, by clear and convincing evidence, that Mary, and not Michael's mother or sister, was the person who was attempting in good faith to implement Michael's treatment wishes. Pet. App. 83a. There is far more than mere "competent and probative evidence" (*Cruzan*, 497 U.S. at 287 n.12) of Michael's desire to entrust Mary to act in his behalf, and the question reserved in *Cruzan* is thus properly presented.

* * * * *

At bottom, this case is about the Michigan Supreme Court's decision to substitute its view of the quality of Michael's life and hence of the wisdom of withdrawing treatment for the views that Michael expressed before his accident and for the trust he placed in Mary to honor his wishes. Nothing in the traditions of individual and family autonomy that have long informed this Court's understanding of the fundamental liberty interests protected by the Due Process Clause permit such state inter-

ference, see *Parham* v. *J.R.*, 442 U.S. 584, 600-02 (1979), nor should *Cruzan* be interpreted to sanction such a result. The decision of the Michigan Supreme Court is irreconcilable with other state supreme court decisions as well as with decisions of this Court and, unless review is granted by this Court, will operate in the future, as it has in this case, to deprive individuals of their rights under the United States Constitution.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
MARK E. HADDAD
PAUL E. KALB
MARISA A. GOMEZ
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

ANDREW J. BRODER *
THOMAS F. NAUGHTON
VLCKO, LANE, PAYNE & BRODER, P.C.
32100 Telegraph Rd., Ste. 200
Bingham Farms, MI 48025
(810) 642-7733

Attorneys for Petitioner

* Counsel of Record

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